**DEPARTMENT OF CORPORATIONS** **www.corp.ca.gov**

**DEMETRIOS A. BOUTRIS**
**California Corporations Commissioner**
**Sacramento, California**

IN REPLY REFER TO:
FILE NO: OP 6769 CSL

## COMMISSIONER'S OPINION 01/1C

THIS INTERPRETIVE OPINION IS ISSUED BY THE COMMISSIONER OF CORPORATIONS PURSUANT TO CORPORATIONS CODE SECTION 25618 OF THE CORPORATE SECURITIES LAW OF 1968. IT IS APPLICABLE ONLY TO THE TRANSACTION IDENTIFIED IN THIS OPINION REQUEST, AND MAY NOT BE RELIED UPON IN CONNECTION WITH ANY OTHER TRANSACTION.

December 6, 2001

Ms. Darcy M. Norville
Tonkon Torp LLP
1600 Pioneer Tower
888 SW Fifth Avenue
Portland, Oregon 97204

Dear Ms. Norville:

The request for an interpretive opinion on behalf of David Evans and Associates, Inc. ("DEA") dated October 30, 2001, has been considered by the California Corporations Commissioner ("Commissioner"). Below is the question of law, representations of fact, legal analysis and conclusion, to address this request.

### QUESTION OF LAW

This request raises the question whether DEA is a "broker-dealer" as defined in Corporations Code Section 25004. More specifically, the question is whether DEA is engaging in the business of effecting transactions in securities, when it allows shareholders and employees residing in California to participate in DEA's Internal Market Program, and makes available a list of program participants who contact each other to trade securities, under the limited circumstances described below.

**REPRESENTATIONS OF FACT**

You have represented, and the Commissioner relies on, the following facts for purposes of this opinion.

DEA is an engineering and consulting firm headquartered in Portland, Oregon, with offices in California and seven other states. As of June 27, 2001, DEA had 124 shareholders. Of these, 112 are current employees, 8 are former employees, and 4 are non-employee directors. DEA has 173 employees residing in California, 9 of whom are shareholders.

DEA allows many of its employees to acquire its common stock through stock option plans. DEA's common stock is not publicly traded, and DEA has no plans for a public offering of its stock. Furthermore, DEA's common stock is subject to a 1991 shareholder agreement containing transfer restrictions, including stock legend conditions.

Given the limited marketability of its common stock, DEA has developed the Internal Market Program (the "program") to provide its shareholders with some degree of liquidity. The program enables eligible DEA shareholders and employees ("participants") to contact each other, so they can trade DEA common stock. To date, California residents have not participated in the program.

Once a year under the program, DEA allows participants who are interested in selling or purchasing shares to list their names and contact information on a list on the company's electronic bulletin board accessed through the company's intranet. List information is limited to descriptions of participants and disclosures of legal requirements.

Descriptions of participants on the list made accessible to California participants, as well as the descriptions of California participants made accessible to all other participants, will be limited to the participants' names, addresses (including electronic mail addresses), and telephone numbers. Disclosures on the list will be narrowly tailored to explaining the application of state and federal securities laws to offers and sales of common stock, and cautioning that the program requires securities transactions to be negotiated and executed solely by participants independent of DEA. No other information (including terms that are subject to negotiation such as quantity of shares or price) will be described or otherwise disclosed to participants.

Distribution of a list will be limited to participants. DEA will not publicize to the general public that it makes the list available to participants. All California participants are either accredited investors or have sufficient knowledge or experience to protect themselves in their transactions involving DEA common stock. DEA's list will be made available for a limited period of time (i.e., May 15 to July 31.) The list will be available to participants through an electronic bulletin board accessed through DEA's intranet. Only current DEA employees and current non-employee members of DEA's Board of Directors have access to this password-protected intranet bulletin board.

Following DEA's release of this list and its most recent financial statements, trading will be allowed between participants during a limited period of time (i.e., July 1 to July 31.) DEA will not do any of the following in connection with the program:

- promote sales, solicit buyers or sellers, or match buyers with sellers;
- participate in any negotiations between participants of the program;
- provide opinions or advice about the merits of any stock transaction;
- arrange financing or handle payments for offers or sales of the common stock;
- charge or receive any fees, commissions, or other direct or indirect compensation; and
- make the maintenance or operation of this program a substantial part of any DEA employee's duties.

Under the program rules, program eligibility is limited to purchasers of shares who must be current DEA employees, and sellers of shares who must be either current DEA employees or current non-employee members of DEA's Board of Directors. Hence, former employees and former non-employee members of the board are ineligible. Moreover, the rules require shareholders to hold shares for two years or more and require employees to be employed for two years or more. The rules also impose limitations on the number of shares that may be sold by eligible officers and members of the board.

Pursuant to the program rules, participants must negotiate directly between themselves all provisions concerning the number of shares to be bought and sold, the price per share, the manner of payment, and other terms of sale. Moreover, participants must arrange between themselves payments for common stock purchased through the program.

DEA's involvement will be limited to reviewing sales for compliance with securities laws and the program rules, and acting as a transfer agent. As transfer agent**,** DEA's activities will only include updating its shareholder list and issuing share certificates to new shareholders, and ensuring that new shareholders execute a Transfer Restrictions Letter thereby binding them to DEA's existing stock transfer restrictions.

**LEGAL ANALYSIS**

Corporations Code Section 25004 defines a "broker-dealer" as any person engaged in the business of effecting transactions in securities in this state for the account of others or for his own account. The primary question therefore is whether DEA is "engaged in the business of effecting transactions in securities." This determination requires a review of previous Commissioner's Opinion Nos. 77/21C, 78/8C and 78/9C, including

California case law and Securities and Exchange Commission ("SEC") No-Action Letters relied upon in those opinions.

Each of the Commissioner's earlier opinions involved an issuer's proposal to provide stockholders or other investors with information to facilitate their buying and selling of securities for which there was a limited public market. In each opinion, the Commissioner concluded that the issuer was a broker-dealer as defined in Corporations Code Section 25004 because the issuer's activities, including the provision of information to investors, involved the issuer to such an extent that it was deemed to be effecting the transaction.

In Comm. Op. No. 77/21C dated October 6, 1977, the issuer ("Corona") proposed to circulate requests for offers to sell or purchase shares of Corona's stock among shareholders, collect bids and transmit them to shareholders, and collect out-of-pocket costs incurred in circulating those requests. In contrast, DEA will make available a list setting forth only a participant's name, address, and telephone number, in connection with California participants. DEA will not be involved in any negotiations with participants of the program, such as collecting bids and transmitting them to shareholders. Nor will DEA collect or otherwise handle any fees or funds under the program.

In Comm. Op. No. 78/8C dated June 9, 1978, the issuer ("Green Gold") proposed to circulate to its limited partners, and other experienced investors, a tombstone announcement specifying a limited partner's desire to sell partnership interests, together with the initial and proposed price. Green Gold also proposed to collect a fee or other reimbursement for its services. DEA's program, however, is limited to participants consisting of eligible shareholders and employees. DEA will not collect any type of fee or reimbursement under the program. Additionally, DEA will not involve itself in the securities transactions by communicating terms such as price per share or quantity of shares that are subject to negotiations.

Finally, in Comm. Op. No. 78/9C dated June 9, 1978, the issuer ("Spectrum") proposed to provide its shareholders and other interested persons with a list of shareholders expressing an interest in selling their shares. Spectrum also proposed to provide the buyers with any public information they might require for informed investment decisions. Again, DEA's program is not open to any interested investor, but is limited to eligible shareholders and employees. Furthermore, DEA will only provide information limited to identifying interested participants and describing legal requirements.

In each opinion, the Commissioner reasoned in determining that the issuer was a broker-dealer rather than a finder:

"Moreover, because an issuer or a person in control of the issuer, has ready access to shareholder lists, lists of interested purchasers <u>as well as information which would be more likely to bring a buyer and seller together so that a transaction will be effected</u>, it is our opinion that an issuer in performing activities such as those described in your letter

goes beyond the normal activities of a finder (cf. Lyons vs. Stevenson, 65 Cal. App. 3d 595, and cases cited therein)." Emphasis added.

A significant factor in each of these three opinions was the issuer's communicating information that assisted in negotiations between the parties (e.g., bids, initial purchase price, quantity of shares to be sold, and other information concerning the securities.) By contrast, DEA will not be involved in communicating terms of negotiation on any list. In addition, DEA will not participate in any negotiations, offers or sales of its common stock – participants will be engaged in these activities on their own, upon contacting each other.

The Commissioner's previous opinions also cited the Lyons case. In Lyons, the court held that a real estate broker was acting as a finder rather than a broker-dealer. The real estate broker had introduced a buyer to the seller of a mortgage company; however, he did not take part in any conversations or negotiations regarding the sales agreement (including the sale of stock). The court reasoned that the real estate broker was merely a finder as he did not negotiate any of the terms of the transaction or participate in the negotiations. Rather, he merely acted as a conduit by which the buyer and seller were introduced.

As with Lyons, DEA's program will provide a mere conduit between interested buyers and sellers. DEA will do nothing to bring about a sale of its common stock except to facilitate an introduction of eligible buyers and sellers. With respect to program participants in California, only a list of participants will be made available by DEA together with a description of legal requirements. DEA will not communicate or otherwise participate in any negotiations of terms leading to offers and sales of common stock.

In the three earlier opinions discussed above, the Commissioner also relied upon two SEC No-Action Letters in reasoning that the issuer was a broker-dealer (John Asling [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) 79,484 (Aug. 4, 1973) and Washington Mutual Investors Fund [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) 79,522 (Aug. 30, 1973)). These two No-Action Letters stem from an inquiry regarding two proposed alternatives for allowing secondary trading in shares of Washington Mutual Investors Fund ("Fund").

Under the first proposal described in the John Asling No-Action Letter, the SEC concluded that actively matching buy and sell orders through Washington Mutual Fund's office would make that Fund a "broker" as defined in Section 3(a) of the Securities Exchange Act of 1934. In the second proposal described in more detail by the Washington Mutual Investor Fund No-Action Letter, the SEC concluded that the Fund would be a broker when it maintains a list of buyers and sellers and handles their funds.

Unlike these two SEC No-Action Letters, DEA will not match, or handle the funds of, buyers and sellers. Accordingly, DEA's program is distinguishable from the proposals described in those two letters.

**CONCLUSION**

In conclusion, we believe that DEA is not engaged in the business of effecting transactions in securities within the meaning of Corporations Code Section 25004 and is therefore not a "broker-dealer", when it a allows DEA shareholders and employees residing in California to participate in DEA's Internal Market Program by making available a list of program participants who contact each other to trade securities, under the limited circumstances described above.

Dated: December 6, 2001
Sacramento, California

DEMETRIOS A. BOUTRIS
California Corporations Commissioner

By_____
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